Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1997

LORENZO BRANDON,

Petitioner,

vs.

CHICAGO BOARD OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The first issue in this petition is whether the trial court abused its discretion in denying the petitioner's Rule 60 motion to vacate a dismissal for want of prosecution, under the circumstances of the case rendering a decision on an important matter in conflict with the decision of another United States court of appeals on the same matter.

The second issue is whether the trial court's decision decided an important matter which should be settled by the United States Supreme Court.

PARTIES TO THE PROCEEDING

No parties other than those named in the caption were parties before the court of appeals.

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The petitioner, Lorenzo Brandon, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is attached as Appendix A. The transcript of hearing of petitioner's Rule 60 motion before the district court, Northern District of Illinois, is attached as Appendix B. The Court of Appeals' order denying petitioner's request for rehearing is attached as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on April 23, 1998. The Court of Appeals denied a timely petition for rehearing on May 21, 1998 (Appendix C).

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 60 — Relief From Judgment or Order

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after

such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified

as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FRCP Rule 77 — District Courts and Clerks

* * *

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE

When the present case under the Americans with Disabilities Act was filed, the petitioner's appearance and civil cover sheet reflected as his attorneys Paul F. Peters and James C. Reho of the Law Offices of Paul F. Peters, One N. LaSalle St., Suite 1721, Chicago, IL 60602. (Lodging Appendix - 5, 6). Subsequently, the Board of Education had no problem sending notices of motions for extensions to said address. (Lodging Appendix - 7).

In docketing this case, the Clerk of the United States District Court entered attorney Paul *Allen* Peters as the attorney for the petitioner. (Lodging Appendix - 2). This oversight was undoubtedly due to the similarity of his name with that of Paul *F*. Peters, an actual attorney for the petitioner. Thus, subsequent orders and mailings from the court were sent to Clausen, Miller, Gorman, Caffrey & Witous, P.C., 10 S. LaSalle St., Suite 1800, Chicago, IL 60603. Included among these orders were the minute order of October 4, 1995 setting a status date of February 6, 1996 and a trial date. The petitioner's attorneys never received any orders or notices setting any status dates, discovery cutoff dates, or trial dates in this case, despite the fact that the other attorney, Paul Allen Peters, wrote to the clerk of court regarding the error. (Lodging Appendix - 9, 10).

On or about December 13, 1995, this case was dismissed for want of prosecution because of petitioner's failure to appear at two scheduled status hearings. (Lodging Appendix - 12). The petitioner's attorneys never received notice of either of these hearings. The petitioner's attorneys did not receive notice from the court or any other party that the case had been dismissed for want of prosecution.

Ultimately, a check of the court file by the petitioner revealed the erroneous address in question and that the case had been dismissed. The plaintiff's Rule 60 Motion to Vacate was filed on December 16, 1996 and immediately noticed up for January 6, 1997. (Lodging Appendix - 13). However, the case number in the original motion had one digit omitted — 95 C 447 instead of 95 C 4447.

On January 6, 1997, when an attorney for the petitioner arrived in court for hearing on the Motion to Vacate, he noticed the discrepancy in the docketing numbers. He called this to the attention of the clerk on the 20th floor, who told him that the

motion would not be heard that day and that he would have to respindle it. Petitioner's attorney therefore did not appear in court for the motion.

On January 7, 1997, the petitioner's attorney respindled the motion and refiled it with the correct case number. Hearing was set for January 21, 1997.

On or about January 11, 1997, the petitioner's attorneys received a minute order (the first they had received in the case) notifying them that on January 6, 1997, the court had granted their Motion to Vacate. (Lodging Appendix - 25). The petitioner's attorneys inferred that their original motion had been routed to the correct judge after all and had been ruled upon. In order to avoid inconveniencing opposing counsel, an attorney for the plaintiff on January 13, 1997 sent the Board of Education a letter setting forth that the motion had been granted and that opposing counsel did not have to appear in court on January 21, 1997.

On January 21, 1997, an attorney for the Board apparently showed up in court. Taking advantage of the absence of petitioner's attorney, counsel for the Board induced the court to vacate its earlier order (Lodging Appendix - 26) without any notice of motion or motion being given to the plaintiff that such relief was even being sought.

On February 11, 1997, after briefs were filed and a hearing was held, the trial court denied the petitioner's Motion to Vacate (Appendix B). On appeal, the Court of Appeals for the Seventh Circuit upheld the district court's decision and also denied the petitioner's Petition for Rehearing (Appendices A, C).

REASONS FOR GRANTING THE WRIT

I.

THE COURT'S DECISION IN THE PRESENT CASE DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT'S HOLDING IN *MOLLOY v. WILSON*.

The undisputed truth in this case is that, due to a mistake by the clerk of court, the petitioner's attorneys never received a single order or notice from the clerk in this case. The notices sent by the court were sent to a completely different attorney at a completely different law firm. Even when that attorney wrote the clerk a letter pointing out the mistake, nothing was done by the clerk to re-send the notices or alert the correct attorneys to the situation. After petitioner's attorneys failed to appear at two status hearing of which they had no notice, the case was dismissed for want of prosecution. The fact that not notice had been given to petitioner's counsel was clearly documented in the court file, and this knowledge by extension must be imputed to the court. The petitioner's attorneys received no notice of said dismissal, and in fact discovered the dismissal only when the court file in the case was checked later on.

In *Molloy v. Wilson*, 878 F.2d 313 (Ninth Circuit 1989), included as Appendix E, the Ninth Circuit considered a case that, factually, was quite similar to the present one. In that case, the plaintiff filed a § 1983 civil rights action on October 22, 1986. The defendants, after obtaining an extension as in the present case, filed their answer on January 22, 1987. The district court scheduled a mandatory status conference for April 6, 1997. Although the docket and minute order reflected that notice had been mailed to counsel, neither counsel received it. *Molloy v. Wilson*, 878 F.2d at 314.

On April 28, 1998, counsel for the defendant inspected the court file and discovered that the case had been dismissed for want of prosecution at the April 6, 1987 date. Unlike in the present case, defendant's counsel had the courtesy to call plaintiff's counsel and advise him of the dismissal order. *Molloy v. Wilson*, 878 F.2d at 314.

On May 11, 1988, the plaintiff's counsel filed a Motion to Vacate. As in the present case, the plaintiff's counsel argued that the mistake of the court clerk in failing to provide notice of the April 7, 1987 order under Federal Rule of Civil Procedure 77(d) required relief from the order of dismissal pursuant to Rule 60(a) and (b)(6). *Molloy v. Wilson*, 878 F.2d at 315; Plaintiff's Brief in Support of Motion to Vacate Dismissal for Want of Prosecution, (Appendix A, pp. 22-38). As in the *Molloy* case, the district court in the present case ruled that the applicable section of Rule 60(b) was (1), which carries with it a requirement that a motion for relief be filed within one year. In both cases, the district courts ruled that (6), the "catch-all" provision without a specific time limit, did not apply. *Molloy v. Wilson*, 878 F.2d at 315; ruling of Judge Lindberg, (Appendix B).

In the present case, the Court of Appeals of the Seventh Circuit agreed with the district court and affirmed its holding. (Seventh Circuit Opinion, Appendix C.) In *Molloy*, however, the Ninth Circuit came to an entirely different conclusion. The *Molloy* court, citing the Second Circuit's opinion in *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538, 541-42 (Second Circuit 1963), reversed the district court. The Ninth Circuit held that: "Once a party has appeared generally in an action, he is entitled to notice of all proceedings and actions taken in the case. . . ." *Molloy*, 878 F.2d at 313. The Ninth Circuit went on to say that:

> The circumstances as presented in this case, involving the non-receipt by a party of an order of dismissal,

> warrant moderation of the harsh time limitation of Rule 60(b) and give the district court discretion to treat the motion to vacate as arising under clause (6) of Rule 60(b), notwithstanding that the underlying basis for vacating the judgment does not strictly constitute "any other reason" as that phrase is used in the rule.

Molloy, 878 F.2d at 316. The Ninth Circuit further cited the *Radack* opinion, in which the Second Circuit concluded that: "if notice of the judgment was not sent, the judge has the power, in the exercise of a sound discretion, to grant relief under Rule 60(b)(6)." *Radack*, 318 F.2d 538 at 543.

The situation in the present case is factually analogous (in fact, near-identical) to that of *Malloy* and conceptually identical to the situation discussed in *Radack*. However, in the present case, both the district court and the Seventh Circuit ruled that Rule 60(b)(1) applied exclusively, that Rule 60(b)(6) did not apply, and that the one-year time limit in (1) precluded relief to the petitioner. This ruling stands in sharp and irreconcilable opposition to the ruling of the *Molloy* court and the principle set forth in *Radack*.

A pre-eminent reason for the granting of a writ of certiorari is when a United States court of appeal has rendered a decision on an important matter in conflict with the decision of another United States court of appeals on the same matter. There is no doubt that the Seventh Circuit's holding in this case conflicts directly with the Ninth Circuit's holding in *Molloy*, as well as the Second Circuit's rationale in *Radack*. The matter at hand is one of extreme importance, as well. Rule 60 is the vehicle through which litigants who have had their cases dismissed for reasons other than the merits may regain the opportunity to have their day in court. The purpose of Rule 60 is to promote

the determination of disputes on their equities, not through procedural *fiat*. In this case, an innocent petitioner whose attorneys had been ignored by the court clerk was attempting to use Rule 60 not to gain an unfair advantage, but merely to restore himself to the position he would have been in had the court itself followed its own Rule 77. Given the frequent use of Rule 60 by litigants, and given that its application can make the difference between an unearned triumph and a fair hearing, it is essential that the application of Rule 60 be uniform between federal circuits.

Further, this case involves important concepts of notice to parties. As the *Molloy* court discusses but the Seventh Circuit did not mention, there is a fundamental right, as reflected in Rule 77, that parties be given notice of the court's ex-parte actions in their cases — particularly when the court is terminating the case in one way or another. The Seventh Circuit's holding in this case implies a total lack of responsibility of the court to follow its own rules and procedures. If Rule 77 means nothing, then why does it exist? Why do courts mail minute orders to the parties in a case? The reason is obviously to insure that the parties are given notice of what is happening with their cases and of what the courts have decreed must be done in those cases. Attorneys rely on notices from the courts just as opposing attorneys and the court itself relies on notices given by attorneys.

If a litigant in a case had a motion granted, but it was later shown that no notice was ever sent to the opposing side concerning the motion, the result of that motion would most certainly be vacated when the omission was discovered. The same principle applies to the present case. The court exercised its authority to dismiss the case for want of prosecution, although it certainly would not have done so if it had known that petitioner's counsel did not have notice of the status dates. A far more disturbing aspect of this case is that if one assumes

the court had knowledge of its own file, then the holding of the Seventh Circuit discards the concept of justice and undermines every citizen's faith in the federal courts. In this case it was absolutely clear at the time of the entry of the district court's dismissing the case that the petitioner had no notice of the scheduled hearings: the clerk, with notice and actual knowledge of the improper notice, continued to fail to notify the attorney of record for the petitioner. Further, no notice of the dismissal itself was conveyed to the petitioner's attorneys. The trial court and Seventh Circuit should have recognized that they had the authority under Rule 60(b)(6) to undo the harm done by these fundamental failures of notice stemming from the trial judge and court clerk's failure to be aware of the information already in the court record at the time of the trial court's ruling. The Ninth Circuit, properly, held that the trial court did have such authority to correct an obvious mistake by the court clerk, whose documented mistakes were either ignored by or went unnoticed by the trial court at the time of entry of the dismissal order. Not only did the trial court and Seventh Circuit refuse to grant the plaintiff relief, they refused to even acknowledge that, under 60(b)(6), the trial court had the ability to do.

The Seventh Circuit, in its opinion, found a requirement that the court clerk "affirmatively mislead" a party before relief could be granted. Its opinion states that

> The instant case is distinguishable from the cases cited in the *Wesco* dissent, where various court clerks affirmatively misled parties as to the status of their cases. . . . Here the Clerk did not affirmatively mislead plaintiff's counsel in any way.

(Appendix B - 6).

The clerk did indeed affirmatively mislead the plaintiff's attorneys in the present case. In fact, the Clerk also affirmatively misled the court itself.

Rule 77(d) required the Clerk to send the plaintiff all the relevant notices:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear.

Pages 10 and 11 of the Lodging Appendix comprise the document prepared by the Clerk on or about October 4, 1995, and filed with the court. It purports to inform the plaintiff of various dates in the case, including a February 6, 1996 status hearing. Its states on its face: "Attention: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. . . ." It also states, after the paragraph describing Judge Lindberg's order, "Mailed notice."

Page 12 of the Lodging Appendix contains another document filed by the Clerk and contained in the record of the case. In the lower right-hand corner, it indicates that notice was mailed on December 14, 1995, again presumably in accordance with Rule 77(d).

Finally, when the petitioner's attorney went to court on the original hearing date of the petitioner's motion to vacate, he was told that because of an incorrect (by one digit) case number, the case would not be heard and would have to be respindled. In fact, the case had made it to the proper courtroom and was indeed ruled upon, favorably, by the court. The clerk's affirmative misrepresentation that the case had to be respindled led to a second hearing date (even though the court had granted

the motion) and an opportunity for the defendant to step up without the petitioner's attorney's being present and persuade the court to *sua sponte* rescind its order, without any notice to the petitioner of the defendant's "motion" to vacate the order that was entered on January 6, 1997 vacating the prior dismissal.

All four of the above communications comprise affirmative misrepresentations by the clerk. The notice was *not* sent pursuant to Rule 77(d), because it was *not* sent to the plaintiff, who was a party not in default. Proper notice was *not* mailed. In fact, *no* notice was mailed to the plaintiff. Further, there was *no* notice mailed to the plaintiff on December 14, 1995. All of these statements, made by the clerk, contained in the court record, and relied upon by the court, are materially and affirmatively wrong. They positively misrepresent that notice was mailed to the petitioner. They were obviously relied upon by the court when it dismissed the petitioner's case. Also, the clerk's statement that the motion to vacate had not reached the court and had to be respindled eventually led to the court vacating its ruling without the petitioner's attorneys even being present.

If Judge Lindberg had known that no notice was going to the petitioner and his attorneys of any status dates, he would have acted differently than he did. Petitioner's counsel cannot believe that Judge Lindberg had actual knowledge of the court file when he entered the dismissal order. If the court did have that knowledge, the implication for our system of justice would be dire indeed. It is doubtful that any competent judge, knowing that one side was not receiving notice of hearings because of the clerk's failure to send it, would dismiss a case for that side's failure to attend a hearing. Further, the petitioner's attorneys, who were relying on the clerk to send them proper notice, were profoundly affected by the clerk's misrepresentations. While the clerk was saying that notice had been sent, the petitioner's attorneys were sent no notice.

The clerk's misrepresentations had exactly the same type of positive ill effect as the various misrepresentations in the cases cited in the *Wesco* dissent. As Judge Flaum wrote in that case,

> It is no extraordinary proposition that the affirmative misleading of a party by judicial process can constitute the "extraordinary circumstances" demanded by Rule 60(b)(6) — especially when, as here that misleading produces the potential for substantial injustice.

Wesco Products Co. v. Alloy Automotive Co., 880 F.2d 981, 986-987 (7th Cir. 1989). In the present case, the Clerk's misrepresentations were the immediate, proximate, and undeniable cause of an innocent petitioner's case being dismissed — dismissed after the court (with agreement from petitioner's counsel) had not once, but twice, given the respondent an opportunity to file its tardy response. This is precisely the type of one-of-a-kind, uncategorizable situation that a catch-all provision such as Rule 60(b)(6) is intended to alleviate. It is without question a substantial injustice when a plaintiff's case is dismissed because the court fails to send his attorneys any notice whatsoever of scheduled court hearings — even after the court and its Clerk have received written notice that the notices were being sent to the wrong person. It is a substantial injustice when the court, unwilling to shoulder responsibility for its own clerk's actions, instead penalizes an innocent litigant. The fact that a "catch-all" provision even exists suggests that it was intended for use to prevent injustice in precisely the kind of unusual situation presented by this case.

In the *Marshall v. Boyd* case cited in *Wesco*, 658 F.2d 552, 554-555 (8th Cir. 1981), Rule 60(b)(6) relief was found appropriate when a district court judge entered a default

judgment without first giving parties notice that it was contemplating such action. In the present case, upon motion by the petitioner, the trial court actually did vacate the dismissal of the cause of action (Lodging Appendix 25). However, the petitioner's attorneys, having been informed by the clerk that a wrong case number had prevented the court from receiving the motion, refiled and re-noticed the motion before receiving the order from the clerk. Petitioner's attorneys wrote to the respondent's attorneys saying their attendance would not be necessary on the second date, since the motion had already been granted. Not only did the respondent's attorney attend the second date anyway, but, in rather sinister fashion, and knowing the petitioner's attorney would not be there, the respondent's attorney persuaded the court to vacate its order with no notice to the petitioner that any such action was being contemplated. Thus, without notice and without any motion having been filed by the defendants, the petitioner lost the relief he had been sought and initially granted without opposition by the defendant.

The petitioner's attorneys in this case never thought to do anything without notifying the defendant's attorneys. The respondent's attorneys, on the other hand, felt free to go behind the petitioner's attorneys' back and influence the court when they knew the petitioner's attorneys would not be present. Not knowing or being advised of the situation, the trial court unfortunately went along with them. This improper granting of the respondent's wishes without any motion pending merits relief under Rule 60(b)(6). Because of his attorneys' desire to make absolutely sure their motion was brought to the attention of the court, the petitioner had relief that had already been granted taken back without the opportunity to object.

Finally, it is worth noting that there is confusion even on the faces of the unreceived notices themselves. The first unreceived notice, dated October 4, 1995 and stemming from

respondent's uncontested motion for enlargement of time on October 3, contains a status date of February 6, 1996. Respondent's uncontested Motion for Leave to File Instanter was noticed for November 14, 1995, but the court evidently ruled on it earlier and on November 8 issued an order setting status for November 30, 1995. Rather than indicating that the status was re-set, the Clerk indicated on the November 8, 1995 docket entry that the status had been "set," indicated that the Clerk had not known of the earlier status date. Then, somehow, the status was again re-set, this time apparently for December 12. Throughout all this, it seems inconceivable that the Clerk, the court, or especially respondent's counsel did not suspect that the reason petitioner's counsel did not attend two status hearings was because notice was not being sent. In this case, the proceedings became muddied by the fact that the respondent did not answer the complaint on a timely basis, went to court for an enlargement of time and then did not answer, and finally brought yet another motion seeking leave to file *instanter*, which was granted by the court prior to its scheduled date with no copy of the order and the accompanying schedule being sent to the plaintiff. All this jockeying around before an answer was filed negated any awareness by the petitioner's attorneys that there was a pressing need for case tracking, since no responsive pleading was even on record. The dilatory conduct by the respondent derailed any normal tracking by the plaintiff. Even before the respondent's answer was filed, its prior effort to do so had generated important notices and dates that were never sent to the plaintiff. The changing schedules generated by the several motions of the respondent, coupled with the clerk's improper conduct, set the petitioner up for an undeserved fall. In addition, the respondent was actually rewarded for *not* giving the petitioner notice that it would ask the court to vacate its previous order granting the petitioner's motion to vacate. The respondent persuaded the court to vacate its order at a hearing at which the respondent's attorneys knew the petitioner's

attorney would not be present, without giving any notice and without filing a motion. The respondent should not be allowed to take advantage of this conduct.

CONCLUSION

The Seventh Circuit's holding stands for the proposition that even if Rule 77 is not followed by the clerk of court, litigants have no recourse under Rule 60(b)(6) for relief. The *Molloy* and *Radack* courts say otherwise. There is a direct conflict between the circuits on this issue, one which reaches the fundamental equitable underpinnings of Rule 60. If the present petition for certiorari is not granted and the conflict resolved, the application of Rule 60 to lack-of-notice situations, as well as the practical impact of adherence to Rule 77 on Rule 60 motions, will remain murky. The issue presented in this case impacts the very core of our federal system of justice. It deals with the right of every party to a case to be given notice of the court's actions and orders therein. The implication of the Seventh Circuit upholding a dismissal of a case in which the court itself acknowledges no notice was given as required by Rule 77, and in which the dismissal occurred for no other reason than the failure of notice, is frightening. At stake is our nation's faith that the federal courts will justly afford all litigants a fair hearing on the merits. Because of the direct conflict with the *Molloy* case and with the rationale set forth in *Radack*, and because of the importance of the Rule 60 issues raised, this case calls for the granting of a writ of certiorari. This petition does not present an incredibly elaborate fact situation. For the relatively small amount of the Supreme Court's time and resources necessary to resolve this conflict, the benefits to the body of jurisprudence surrounding Rule 60 would be substantial.

Accordingly, the petitioner, Lorenzo Brandon, requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED APRIL 23, 1998

In the United States Court of Appeals

For the Seventh Circuit

No. 97-1578

LORENZO BRANDON,

Plaintiff-Appellant,

v.

CHICAGO BOARD OF EDUCATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 4447—**George W. Lindberg**, *Judge*.

ARGUED NOVEMBER 4, 1997—DECIDED APRIL 23, 1998

Before POSNER, *Chief Judge*, COFFEY and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. Lorenzo Brandon sought Rule 60 relief from a judgment entered against him for failure to prosecute his case. The district court denied relief and Brandon now appeals. The facts are unusual. Indeed, Brandon claims they are unique. Brandon filed his Americans with Disabilities action against the Chicago Board of Education on August 2, 1995. His attorneys, Paul F. Peters and James C. Reho, entered appearances in the case, listing as their address the Law Offices of Paul F. Peters, One North LaSalle Street, Chicago. It is undisputed that in docketing the case, the Clerk of the United States District Court erroneously entered Paul A. Peters, another Chicago

attorney, who is located at 10 South LaSalle Street, Chicago, as attorney for the plaintiff. As a result of this error, subsequent mailings from the court were directed to the wrong attorney at the wrong address. Admirably, Paul A. Peters actually took the time to write to the Clerk of the district court, informing the Clerk that he was not counsel of record in the case, had no connection to the case, and was returning any materials sent to him.

Unfortunately, the Clerk's office still did not understand the nature of its error, and continued to send all minute orders and other mailings to the wrong address. As a result, Brandon's counsel never received notice of two different status hearings, and failed to appear. After failing to appear for the second status hearing, the court dismissed the case for want of prosecution on December 13, 1995. The order dismissing the case was also sent to the wrong address. A little more than a year passed before plaintiff's counsel began to wonder what happened to the case. Upon visiting the Clerk's office in late 1996, he discovered his case had been quite active without him. Included in the court's file was the letter from Paul A. Peters, orders setting status hearings, and the order dismissing the case for want of prosecution.[1]

On December 16, 1996, one year and three days after the dismissal, Paul F. Peters filed a Rule 60 motion to vacate the judgment. Astonishingly, yet another clerical error, this one caused by plaintiff's counsel, caused the motion to be spindled under the wrong case number. When plaintiff's counsel noticed this error on the day the motion

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[1] The Board of Education filed two motions early in the case, one to extend the time to answer, and the other to file the answer *instanter*. Brandon received a notice for each of these motions, and opposed neither. The court entered minute orders granting the motions and, as before, the Clerk mailed the minute orders to the wrong attorney. The Board rightly points out that Brandon should have known something was amiss when he failed to receive either order.

was to be heard, he pointed it out to the Clerk's office. The Clerk's office told him the motion would not be heard that day, and would have to be re-noticed. Plaintiff's counsel then refiled the motion under the correct case number. Before the new date for the hearing, however, plaintiff's counsel received a minute order from the court, granting the motion. As a courtesy, plaintiff's counsel sent a letter to defendant's counsel, stating that the motion had been granted and no appearance was necessary on the date set for hearing the motion. Nevertheless, defendant's counsel appeared in court on the day of the hearing and persuaded the court to vacate its order granting Rule 60 relief. After briefing on the motion, the court ultimately denied Rule 60 relief.

On appeal, Brandon argues that he cannot be faulted for a lack of diligence when he was never notified by the court that there was anything he was supposed to be doing. He never ignored a court order, he contends, because he never knew about any orders. Rather, the clerical error in the Clerk's office was the source of the problem, and the district court abused its discretion in refusing to grant Rule 60 relief. Although Brandon initially moved for relief under Rule 60(a), he subsequently argued (and argues on appeal) that he is entitled to relief under Rule 60(b)(6). He admitted at oral argument that he is abandoning any claim to relief under Rule 60(a), which by its own terms applies only to clerical mistakes in "judgments, orders or other parts of the record and errors therein arising from oversight or omission."[2] The Chicago Board of Education

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[2] Brandon is correct to abandon his Rule 60(a) argument. *See Wesco Products Co. v. Alloy Automotive Co*, 880 F.2d 981, 984 (7th Cir. 1989). We noted there that district courts often have difficulty determining whether motions are brought to correct a clerical error (as opposed to some other kind of error). "In this circuit, we have identified the relevant distinction as being between changes that implement the result intended by the court at the time the order was entered and changes that alter the

(continued...)

focuses its response on Brandon's lack of entitlement to relief under Rule 60(b)(1), stating that it is the only conceivably relevant subsection.

We begin by examining Rule 60(b), which provides, in relevant part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

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[2] (...continued)
original meaning to correct a legal or factual error. Thus, '[i]f the flaw lies in the translation of the original meaning to the judgment, then Rule 60(a) allows a correction; if the judgment captures the original meaning but is infected by error, [ ] the parties must seek another source of authority to correct the mistake.'" *Id.* (citing *United States v. Griffin*, 782 F.2d 1393, 1396-97 (7th Cir. 1986)) (internal citations omitted). In the instant case, as in *Wesco*, the dismissal for want of prosecution accurately reflected the court's intention at the time it was entered. Thus, the error, to the extent there was one, was not in the transcription, but in the court's decision, a ground for relief not contained in Rule 60(a).

Neither side argues that subsections (2) through (5) are applicable. Instead, Brandon argues that he is entitled to relief under subsection (b)(6), the catchall section. The Board contends that subsection (b)(1) is the only applicable section. The parties agree that we may not reverse a trial court's denial of a Rule 60(b) motion absent an abuse of discretion. *See Dickerson v. Board of Education of Ford Heights, Illinois*, 32 F.3d 1114, 1116 (7th Cir. 1994) (trial court's denial of Rule 60(b) motion reviewed under a highly deferential standard, and reversed only for abuse of discretion). Moreover, because a court's dismissal for failure to prosecute is itself reviewed only for abuse of discretion, "a court's decision under Rule 60(b) not to reinstate a case dismissed for want of prosecution has been described as 'discretion piled on discretion.'" *Id.*, 32 F.3d at 1117.

"Inherent in the structure of Rule 60(b) is the principle that the first three clauses and the catchall clause are mutually exclusive. Thus, if the asserted grounds for relief fall within the terms of the first three clauses of Rule 60(b), relief under the catchall provision is not available." *Wesco Products Co. v. Alloy Automotive Co.*, 880 F.2d 981, 983 (7th Cir. 1989) (internal citations omitted). Therefore, we must first determine if the relief sought falls within Rule 60(b)(1). We noted in *Wesco* that Rule 60(b)(1) applies to errors by judicial officers as well as parties. 880 F.2d at 984-85. The district court here appeared to be analyzing the motion pursuant to Rule 60(b)(1), finding that "[t]here was a lack of diligence," and that this was "certainly not excusable neglect." *See* Transcript of Proceedings before the Honorable George W. Lindberg, Feb. 11, 1997, at p. 8. The district court also acknowledged that Rule 60(b)(1) applies to errors by the court, stating that "if the rules mean anything, and the Seventh Circuit jurisprudence means anything, it means that lawyers must follow their cases. They cannot rely on the Judge, the law clerks or the courtroom deputies or the Clerk's office. They must follow their case." *Id.*

We agree with the district court that Rule 60(b)(1) is the appropriate mechanism for analyzing Brandon's request for relief. Indeed, the facts here demonstrate an unusual combination of error by the Clerk's office and neglect by the attorney.[3] Rule 60(b)(1) covers both. Having found that Rule 60(b)(1) applies, we must necessarily find that Rule 60(b)(6) does not apply. *Wesco*, 880 F.2d at 983. By its own terms, a motion brought pursuant to Rule 60(b)(1) must be made within one year of the date the judgment was entered. "[T]he one year time limit is jurisdictional and may not be extended in any event. . . ." *Wesco*, 880 F.2d at 985. No one disputes that Brandon brought his motion one year and three days after judgment was entered against him. We therefore conclude that the district court did not abuse its discretion in denying relief.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[3] The instant case is distinguishable from the cases cited in the *Wesco* dissent, where various court clerks affirmatively misled parties as to the status of their cases. *See* 880 F.2d at 986-87 (Ripple, *Circuit Judge, dissenting*). Here, the Clerk did not affirmatively mislead plaintiff's counsel in any way. Indeed, when plaintiff's counsel finally went to the Clerk's office to determine the status of the case, the Clerk provided a complete and accurate record of the proceedings.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED FEBRUARY 11, 1997

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 4447

LORENZO BRANDON,

Plaintiff,

vs.

THE CHICAGO BOARD OF EDUCATION,

Defendant.

219 South Dearborn Street
Chicago, Illinois 60604
Tuesday, February 11, 1997
9:15 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE GEORGE W. LINDBERG

* * *

[2] THE CLERK: 95 C 4447, Brandon versus Board of Education.

Appendix B

MR. HALL: Good morning, your Honor. I'm Robert Hall here on behalf of the Board of Education.

MR. REHO: Good morning, your Honor. Jim Reho for the plaintiff.

THE COURT: Let me just get myself a fast track here. The cleaning folk apparently dumped everything on my desk.

Okay. Let's see. What I'm concerned about with regard to the lapse of time here, it appears that there was more than a year between the dismissal and the motion to vacate.

In other words, it does not appear that you followed the case.

MR. REHO: Your Honor —

THE COURT: I understand that the Clerk's office had the wrong lawyer, but apparently you didn't take any action on your own.

MR. REHO: Could I respond to that.

THE COURT: Sure.

MR. REHO: Your Honor, this is a case — I think it it's pretty clear that we weren't getting any notice of anything.

It's a case where we have our evidence, and we were simply waiting to hear from the Court to get whatever schedule [3] the Court was going to set up.

There were no motions pending. There was — there was no discovery propounded by the Board of Education. We were simply in a holding pattern waiting to hear from the Court.

When we did not hear from the Court, we did check the file, and we did find out what happened in this case, and we did promptly file our motion.

THE COURT: How long was that?

MR. REHO: From when to when, your Honor?

THE COURT: That's right, from when to when.

MR. REHO: Well, it was, I think, a year and a couple of days when we filed our original motion to vacate in the case.

THE COURT: Let me ask whether or not — does this type of thing happen to you in any other cases in this building?

MR. REHO: You mean — regarding the notice?

THE COURT: Where they — the Clerk's office picked up the wrong lawyer.

MR. REHO: Never, your Honor. I have never had that happen. I was mightily shocked to find that that had happened.

MR. HALL: Your Honor, may I respond.

THE COURT: Surely.

MR. HALL: Your Honor, this is a case in which plaintiff's attorneys are claiming that they are entitled to [4] relief based on Rule 60(b), based solely on their claim that they didn't receive notice from the Clerk's office regarding what happened in this case.

There are at least three Seventh Circuit opinions that I've cited to you in my opposition brief that say that just saying that you didn't receive such notice from the Clerk's office does not entitle you to the relief that they are seeking.

In order to get that type of relief, your Honor, you have to show extraordinary circumstances, and you also must show that you have represented your case and prosecuted your action with due diligence.

And that's what's lacking here, your Honor — due diligence.

If I can cite to one of the cases, Williams v. Hatcher that's cited in my opposition on page seven; in that case, counsel had done nothing to check on the status of his case seven months, as opposed to the year that went by here.

And in that case, the courts — the Appellate Court said that you are not entitled to relieve under 60(b)(6) because the Clerk cannot take the responsibility that you have represent your client with due diligence in the actions that you file.

You asked, your Honor, for counsel to provide you where a response to our opposition that would outline for you [5] the due diligence with which they represented their client.

That's totally lacking from the response that they provided you.

Again, all they talked about is the fact that they didn't get notice from the Clerk here.

To say that we didn't propound any discovery, your Honor, in a case that was dismissed is just simply ludicrous. Of course, we didn't propound discovery. There was no case.

Meanwhile, more than a year has gone by —

THE COURT: I think he was referring to early on. It's not uncommon that in connection with an answer, there is a exchange of discovery. I think that's the period that he's talking about.

MR. HALL: Okay. Well, we did do an answer, your Honor, but we didn't require any discovery in order to do that answer.

I'm sorry, I thought we were referring to that year period during which nothing was done.

And, also, your Honor, I just wanted to point out for the record that plaintiff's counsel cites to Rule 55, and also the Roxford case that depends on Rule 55.

Rule 55 has no bearing on this action, your Honor, because what that says is, when a party files a motion for dismissal for failure to prosecute, or for other reasons, that the party must give three days notice of that motion to any [6] party that's filed an appearance in the case.

In that case, there was a bankruptcy action, and the whole discussion was about whether or not the party who had received notice from another party had already filed an appearance.

And they said because there were conversations between counsel and between the parties that hadn't filed an appearance, et cetera, that the party should have notified that they were filing this motion.

Here, your Honor, the Court on its own initiative entered the motion — entered the dismissal. There was no motion from us. So, of course, we didn't provide any notice.

That wouldn't have been our role, your Honor. So that just is simply an inapplicable rule and an inapplicable decision.

MR. REHO: Your Honor, if I could respond briefly to that.

THE COURT: Go right ahead.

MR. REHO: He keeps citing the Williams v. Hatcher case which I don't understand at all, because if you read that case, what happened in that case was that attorneys for the defendant were advised that various post-trial motions in the case had been denied.

What happened was, Hatcher was a government official, [7] and his attorneys changed because he left his office.

His own attorneys, who had been given notice, didn't notify him and, then, he missed a deadline.

That has nothing to do with the present case in which there is — there was no notice given of anything to anyone.

MR. HALL: That's actually not an accurate description of Hatcher, your Honor.

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Actually what happened there is, the public official lost his public office during the pendency of the action, and his claim was that he thought that the old attorneys who were representing him in the public action — because he was a public official, they should have been notifying him of what was going on.

And the Court said, no, you didn't have any right to expect them to do that. What you had to do was do this with diligence on your own, because you were named as an individual.

You couldn't just expect these attorneys to take over your responsibility for representing yourself with due diligence or getting counsel to.

And, therefore, just the fact that you didn't receive notice is certainly not going to allow you to receive relief under Rule 60 (b).

So it's not quite what opposing counsel had described to your Honor. But the rule that's stated in Williams v. Hatcher, again, your Honor, is that you cannot receive Rule [8] 60(b) relief, which is what is requested here, merely based on an allegation that you did not receive notice — whether or not that allegation be true.

And the reason for that, your Honor, is that parties have the responsibility of representing themselves in actions with due diligence.

And just as in that case, that due diligence is lacking in this case.

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THE COURT: Okay. That will be the ruling of the Court. It's — I do this reluctantly, but I think if the rules mean anything, and the Seventh Circuit jurisprudence means anything, it means that lawyers must follow their cases.

They cannot rely on the Judge, the law clerks or the courtroom deputies or the Clerk's office. They must follow their case.

That was not done here. I think if it was a much shorter time, I might be concerned, but this is certainly not excusable neglect. There was a lack of diligence, and the Court will deny the motion to vacate.

MR. REHO: Thank you, your Honor.

MR. HALL: Thank you, your Honor.

THE COURT: You bet.

(Proceedings concluded.)

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MAY 21, 1998

UNITED SATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

Honorable RICHARD A. POSNER, Chief Judge

Honorable JOHN L. COFFEY, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 97-1578

LORENZO BRANDON

Plaintiff-Appellant,

v.

CHICAGO BOARD OF EDUCATION

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois

No. 95 C 4447

George W. Lindberg
Judge

Appendix C

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by plaintiff/appellant on May 7, 1998, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is, hereby DENIED.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *MICHAEL JOSEPH MOLLOY v. MARK WILSON, et al.* DECIDED JUNE 28, 1989

Michael Joseph MALLOY,
Plaintiff-Appellant,

v.

Mark WILSON, et al.
Defendants-Appellees.

No. 88-6259

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 5, 1989.

Decided June 28, 1989.

* * *

Before POOLE, BEEZER and TROTT, Circuit Judges.

TROTT, Circuit Judge:

Michael Joseph Molloy appeals from the district court order denying his motion for post-judgment relief. This court has jurisdiction under 28 U.S.C. § 1291. We vacate and remand.

Appendix D

I

BACKGROUND

On October 22, 1986, appellant filed an action for damages under 42 U.S.C. § 1983, alleging various violations of his constitutional rights. Having obtained an extension of time in which to reply, the appellees filed an answer on January 22, 1987. The district court scheduled a mandatory status conference for April 6, 1987, at 10:00 a.m. Notice of the pending hearing was sent to respective counsel for the parties, appellant receiving his notice on March 2, 1987. Neither counsel appeared at the mandatory status conference, and the district court ordered the action dismissed "for lack of prosecution" pursuant to Local Rule 27.2.[1] The docket and the minute order for April 6, 1987, reflect that notice of the dismissal order was mailed to both counsel; however, neither apparently received such notice.

Oblivious to the dismissal of the action, both parties proceeded with their respective discovery in anticipation of trial. Eventually, on April 28, 1988, counsel for appellees inspected the court file and discovered that appellant's action had been

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1. Local Rule 27.2 of the Central District of California States in pertinent part:

> "Failure of counsel for any party to take any of the following steps may be deemed an abandonment or failure to prosecute or defend diligently by the defaulting party: . . .
>
> (b) Appear at pre-trial conference; . . .
>
> Judgment may be entered against the defaulting party either with respect to a specific issue or on the entire case."

dismissed on April 6, 1987, and that an Order of Dismissal had been entered April 7, 1987. Counsel for appellees immediately contacted appellant's counsel and advised him of the district court's dismissal order.

On May 11, 1988, appellant filed a Motion to Vacate the order of dismissal and to reinstate appellant's action to the trial calendar. In a declaration accompanying his motion to vacate, appellant's counsel stated that "due to a heavy trial calendar and the pressure of deadlines during that period, he inadvertently neglected to notate the Status Conference on it." In support of his motion, appellant argued that the mistake of the court clerk in failing to provide notice of the April 7, 1987 order under Fed.R.Civ.P. 77(d) required relief from the order of dismissal pursuant to Fed.R.Civ.P. 60(a) and 60(b)(6).

On June 20, 1988, in a written memorandum opinion, the district court denied appellant's motion to vacate. The district court interpreted Rule 77(d) as imposing a duty on the court clerk to serve notice of the entry of judgment only upon an *appearing* party, and "[s]ince Plaintiff was in default for failure to appear, Rule 77(d) did not require notice to the plaintiff." The court further held that because appellant's counsel relied on excusable neglect in failing to attend the mandatory status conference, Rule 60(b)(l) and not Rule 60(b)(6) was applicable. Accordingly, the district court denied relief because "Rule 60(b)(1) has a one year time limitation which was not complied with by plaintiff's counsel."

Appendix D

II

ANALYSIS

RULE 60 MOTION[2]

1. Standard of Review

We review the district court's denial of a motion to vacate a judgment under Rule 60(b) for an abuse of discretion, and we will reverse "only upon a *clear showing* of abuse of discretion." *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir.1985) (court's emphasis) (quoting *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 685 F.2d 1065, 1071 (9th Cir.1982), *aff'd in relevant part*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984)). An appeal from a denial of a Rule 60(b) motion brings up only the denial of the motion for review, not the merits of the underlying judgment. *Schanen v. United States Dept. of Justice*, 762 F.2d 805, 807 (9th Cir.1985), *as modified*, 798 F.2d 348 (1986).

We review a district court's interpretation of the Federal Rules of Civil Procedure *de novo*. *Jenkins v. Whittaker* Corp., 785 F.2d 720, 736 (9th Cir.), *cert. denied*, 479 U.S. 918, 107 S.Ct. 324, 93 L.Ed.2d 296 (1986).

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2. Appellant's argument that post-judgment relief should be granted pursuant to Fed.R.Civ.P. 60(a) is clearly without merit. Errors correctable under Rule 60(a) include those where what is written or recorded is not what the court intended to write or record. *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir.1987). There is no allegation that the district judge did not intend his dismissal order of April 7, 1987, to say exactly what it did.

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2. Discussion

The lynchpin of appellant's motion for post-judgment relief was his failure to receive notice of the district court's dismissal order. The district court concluded that Rule 77(d) was inapplicable since appellant was "in default for failure to appear." We respectfully disagree with the district court's restrictive interpretation of Rule 77(d).[3]

Once a party has appeared generally in an action, he is entitled to notice of all proceedings and actions taken in the case, irrespective of whether he failed to "appear" at some subsequent stage of the proceedings. *See Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538, 541-42 (2d Cir.1963); *Traveltown, Inc. v. Gerhardt Inv. Group*, 577 F.Supp. 155, 157 n. 2 (N.D.N.Y.1983) (defendants, having answered the complaint, were entitled to immediate notice of the default judgment pursuant to Rule 77(d)). *See also* 7 J. Moore, J. Lucas & K. Sinclair, *Moore's Federal Practice* 177.05 at 77-10 n. 5 (2d ed. 1988). Because appellant has necessarily appeared in this action by reason of his status as plaintiff, we hold that he was entitled to notice of the entry of dismissal pursuant to Rule 77(d).

As already indicated, appellant's motion to vacate was expressly predicated on Rule 60(b)(6). The district court, however, in light of the declaration accompanying the motion, treated it as

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3. Rule 77(d) provides in pertinent part:

> "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear. . . . Lack of notice of the entry by the clerk does not affect the time to appeal. . . ."

a motion pursuant to Rule 60(b)(1). Because the motion was brought more than one year after entry of dismissal, the court held that the one-year limitation period dictated a denial of appellant's motion.

Rule 60(b) states in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for the reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

It has been established in this circuit that clause (6) and the preceding clauses are mutually exclusive; a motion brought under clause (6) must be for some reason other than the five reasons preceding it under the rule. *LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum* Corp., 791 F.2d 1334, 1338 (9th Cir.1986).

The circumstances as presented in this case, involving the non-receipt by a party of an order of dismissal, warrant moderation of the harsh time limitation of Rule 60(b) and give the district court discretion to treat the motion to vacate as arising under clause (6) of Rule 60(b), notwithstanding that the underlying basis for vacating the judgment does not strictly constitute "any other reason" as that phrase is used in the rule.

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The Second Circuit in *Radack, supra,* discussed the effect of the failure of the court clerk to give notice of a dismissal order. In *Radack,* plaintiff's counsel had learned of the dismissal fifteen months after its entry when an attempt was made to serve interrogatories. A motion to vacate was made within one month of the time counsel learned of the dismissal. The underlying justification for vacating the dismissal was counsel's "mistake, inadvertence, surprise, or excusable neglect" and the motion to vacate was therefore barred by the one-year limitation. The court noted, however, that

> lack of notice of the dismissal acts as a bar to the efficacious operation of subsections (1), (2) and (3). Had notice of the entry of judgment been given in this case, the plaintiffs would have been forewarned of the necessity of moving to vacate within one year if they wished to preserve the grounds on which they could most heavily rely, namely, counsel's inadvertence or excusable neglect.

Radack, 318 F.2d at 542. The Second Circuit concluded that "if notice of the judgment was not sent, the judge has the power, in the exercise of a sound discretion, to grant relief under Rule 60(b)(6)." *Id.* at 543.

We find the reasoning in *Radack* persuasive and therefore hold that the one-year limitation of Rule 60(b) does not present an absolute bar to appellant's motion to vacate. To the extent that the district court felt it was procedurally barred by the time limitation of Rule 60(b)(1), we vacate the order denying the motion to vacate and remand in order to enable the district court to exercise its discretion and substantively consider the merits of appellant's motion.

APPENDIX E — LODGING APPENDIX

(Omitted here but submitted separately)